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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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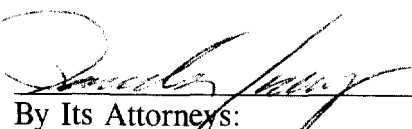
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
BEEHIVE TELEPHONE COMPANY, INC.) CC Docket No. 97-249
BEEHIVE TELEPHONE, INC. NEVADA)
)
TARIFF F.C.C. NO. 1) Transmittal No. 8

To: The Commission

PETITION FOR RECONSIDERATION

BEEHIVE TELEPHONE COMPANY, INC.
BEEHIVE TELEPHONE, INC. NEVADA


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TABLE OF CONTENTS

	<u>Page</u>
SUMMARY	i
INTRODUCTION	1
ARGUMENT	3
I. Beehive was Denied A Fair Hearing	3
II. The Commission Went Beyond Its Jurisdiction In Requiring Beehive To Justify Its Rates Using Part 32 . .	12
III. The Commission Did Not Engage In Reasoned Decision Making	13
A. Factual Errors	14
B. Legal Errors	16
CONCLUSION	22

Summary

Beehive Telephone Company, Inc. and Beehive Telephone, Inc. Nevada (collectively "Beehive"), respectfully requests the Commission to reconsider its *Memorandum Opinion and Order*, FCC 98-105 (June 1, 1998) ("*Order*") on the basis that the Common Carrier Bureau's conduct of its investigation of Beehive's Transmittal No. 8 did not afford Beehive the opportunity for a fair hearing.

Beehive submits that it was denied a fair hearing when the Commission (1) deviated, without notice, from the issues designated for investigation; and (2) denied Beehive the opportunity to respond to the new issues articulated in the *Order*.

Additionally, the Commission went beyond its jurisdiction in finding that Beehive did not meet its burden of proof because it did not produce its records in conformity with Part 32. By its own admission, Beehive was not obligated to comply with Part 32.

Furthermore the Commission's *Order* does not reflect reasoned decision-making which is evidenced by factual and legal errors contained therein. The Commission either misstates or ignores facts contained in Beehive's Direct Case or considers facts in a light least favorable to Beehive. Moreover the Commission applies no articulated standards to the facts. In addition to the factual errors the *Order* contains errors of law. The most blatant error is the Commission's misinterpretation and use of the rebuttable presumption afforded Beehive's legal expenses.

Accordingly, the Commission's rate prescription set forth in the *Order* was not the result of a fair process or reasoned decision-making.

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PETITION FOR RECONSIDERATION

Beehive Telephone Company, Inc. and Beehive Telephone, Inc. Nevada (collectively "Beehive"), by their attorneys, and pursuant to section 405(a) of the Communications Act of 1934, as amended ("Act") and section 1.106(b)(1) of the Commission's Rules ("Rules"), hereby requests the Commission to reconsider its *Memorandum Opinion and Order*, FCC 98-105 (June 1, 1998) ("Order") in the above-captioned proceeding. As a party to the proceeding, Beehive has standing to seek reconsideration. See 47 U.S.C. § 405(a); 47 C.F.R. § 1.106(a)(2).

Introduction

In March 1994, Beehive filed its Interstate Access Tariff F.C.C. No. 1, under which Beehive charged \$0.30458 per minute of premium access for one mile of transport.^{1/} Beehive's access rates were not investigated and went into effect on July 1, 1994.

In June 1995, Beehive made its 1995 annual access tariff filing under which its per minute premium access rate for one mile of transport was reduced by 73% to \$0.08375.^{2/} The Common Carrier

^{1/} See Rebuttals, CC Docket No. 97-249, at 3 (Apr. 24, 1998).

^{2/} See *id.*

Bureau ("Bureau") denied the petition of AT&T Corp. ("AT&T") for an investigation of Beehive's access rates, and allowed those rates to go into effect on July 1, 1995. See *1995 Annual Access Tariff Filings of Non-Price Cap Carriers*, 10 FCC Rcd 12231, 12242 (Com. Car. Bur. 1995).

In September 1995, Beehive sought judicial review of the Commission's decision to tariff access to the 800 Service Management System ("SMS/800"). See *Beehive Telephone, Inc. v. FCC*, No. 95-2579 (D.C. Cir. filed Sept. 15, 1995). Thereafter, the Bureau began investigating Beehive's tariff filings.

The Bureau set Beehive's 1997 annual access tariff filing and its subsequent *Access Charge Reform*^{3/} filing for investigation,^{4/} even though both filings reduced its per-minute premium access rate for one mile of transport.^{5/} The first investigation resulted in an order requiring Beehive to refund \$141,000 to its interexchange carrier customers.^{6/} The second ended with the *Order*, which will force Beehive to refund another \$581,000 to its customers.

The Commission reached its latest refund order by deciding

^{3/} *Access Charge Reform*, 12 FCC Rcd 15982 (1997).

^{4/} See *Beehive Telephone Co., Inc.*, 12 FCC Rcd 20249 (Com. Car. Bur. 1997); *Tariffs Implementing Access Charge Reform*, 13 FCC Rcd 163, 164 (Com. Car. Bur. 1997).

^{5/} The two filings reduced Beehives per-minute, one-mile premium access rate from \$0.08375 to \$0.055777. See Rebuttals at 3.

^{6/} See *Beehive Telephone Co., Inc.*, 13 FCC Rcd 2736 (1998), *reconsideration denied*, FCC 98-83 (released May 6, 1998), *Petition for Review filed, Beehive Telephone Co., Inc. v. FCC*, No. 98-1293 (D.C. Cir. June 30, 1998).

issues not noticed for investigation, and by disregarding hundreds of pages of material compiled by Beehive at a cost of over \$63,000. If allowed to stand, the Order will deal Beehive a crippling financial blow. The Commission's action threatens not only Beehive's ability to continue to serve the public, but its ability to continue to exercise rights protected by the First Amendment.

Argument

I. Beehive was Denied A Fair Hearing

The Order concluded the Bureau's investigation of Beehive's Transmittal No. 8 filed December 17, 1997 and made on a streamlined basis under section 204(a)(3) of the Act, 47 U.S.C. § 204(a)(3). See generally *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, 12 FCC Rcd 2170 (1997) ("*Streamlined Tariff Rules*"). Unfortunately, the Bureau's conduct of the investigation did not afford Beehive the opportunity for a fair hearing.

The Commission has chosen not to promulgate procedural rules to govern tariff investigations. Rather, it has opted to allow the Bureau to formulate procedures on a case-by-case basis.^{2/} Nevertheless, tariff investigations are at least rule makings of particular applicability to the named carriers.^{3/} Therefore, in addition to complying with the "full hearing" requirement of

^{2/} See *Streamlined Tariff Rules*, 12 FCC Rcd at 2220.

^{3/} See *Southwestern Bell Telephone Co.*, 6 FCC Rcd 3760, 3766 (1991); *Investigation of Special Access Tariffs of Local Exchange Carriers*, 5 FCC Rcd 4861, 4861 (1990). See generally *ABC, Inc. v. FCC*, 682 F.2d 25, 31-32 (2d Cir. 1982).

section 204 of the Act, 47 U.S.C. § 204(a)(1), the Commission must conduct tariff investigations in accordance with the procedural requirements applicable to rule makings under the Administrative Procedure Act ("APA").^{2/}

The Bureau elected to conduct its investigation of Beehive's traffic sensitive rates as a "notice and comment proceeding".^{10/} Consequently, it had to tailor procedures for the investigation that satisfied the notice and comment requirements of section 4 of the APA, 5 U.S.C. § 553.

The FCC is obligated under the APA to provide parties with a fair hearing which includes providing sufficient notice of the issues which the party must address. See 5 U.S.C. § 554(b)(3). Notice is sufficient "as long as a party to an administrative proceeding is reasonably apprised of the issues in controversy, and is not misled". *State of Wyoming v. Alexander*, 971 F.2d 531, 542 (10th Cir. 1992) (emphasis deleted).

When an agency changes the issues which are the subject of the proceeding, without notice, the party to the administrative proceeding is misled and is denied the opportunity to affectively present its case. This results in the denial of a fair hearing in violation of due process. Beehive submits that it was denied a fair hearing when the Commission (1) deviated, without notice, from

^{2/} See *AT&T Co. v. FCC*, 572 F.2d 17, 21-23 (2d Cir.), cert. denied, 439 U.S. 875 (1978).

^{10/} *Beehive Telephone Co., Inc.*, 13 FCC Rcd 5142 (Com. Car. Bur. 1998) ("Designation Order").

the issues designated for investigation; and (2) denied Beehive the opportunity to respond to the new issues articulated in the Order.

A. Fundamental Fairness Dictates that A Party Be Apprised Of the Issues On Which They Will Be Judged.

The Commission's predominant charge against Beehive is that Beehive failed to adequately explain the information provided in its Direct Case. In paragraphs 14-16 and 19-21 of the Order, the Commission refers ten times to various costs that Beehive left unexplained or inadequately explained. See Order at 7-10 & n. 62^{11/} Based on Beehive's alleged failure to explain its costs, the Commission concluded that Beehive had not met its burden of proof and that its supporting information is unreliable.^{12/} That was clear error, because Beehive was not on notice that it had to explain each of its costs.

In the *Designation Order*, the Commission identified issues for the investigation of Beehive's Transmittal No. 8 and directed Beehive to file additional supporting documentation. The *Designation Order* contained explicit instructions as to the specific issues and information Beehive was required to address as well as the format in which the information was to be presented.

In the three and one half pages of instructions, the

^{11/} For example, the Commission found that Beehive's cost data "show[s] many inconsistent, questionable, and unexplained entries", Order at 7 (¶ 14); that its cost information "shows numerous unexplained or inadequately explained entries relating to [Joy Enterprises, Inc. ("JEI")]", *id.* at 8 (¶ 15); and that it had not "adequately explained its net investment costs", *id.* at 10 (¶ 20).

^{12/} Order at 10 (¶ 21).

Commission directed Beehive to submit certain, specific information.^{13/} The Commission directed Beehive to "provide detailed cost data for calendar years 1994, 1995, 1996".^{14/} Specifically, Beehive was instructed to provide the following: (a) a complete Table 1 of FCC Armis Report 43-01 for calendar years 1994, 1995, and 1996; (b) unedited general ledgers for calendar years 1994, 1995, and 1996; (c) all subsidiary record information for each summary account for corporate operations, plant specific, plant nonspecific, and customer operations expenses required to be kept in accordance with Section 32.12 of the Rules; (d) certain information regarding lease agreement expenses; (e) a list of all legal expenses included in the general and administrative expense account; (f) identification of all nonregulated activities; (g) a showing of its January 1, 1998 revenue requirements based on 1995 and 1996 actual costs as adjusted to reflect the *Universal Service Order* and the *Access Reform Order*.^{15/}

The Commission directed Beehive to provide an explanation of the data in only five discrete instances. The *Designation Order* instructed Beehive to:

[1]...[E]xplain in detail why its ratio of operating expenses to TPIS reflected in Transmittal No. 8 is significantly higher than its ratio in 1994 and 1995. We also direct Beehive to explain in detail why its operating expenses to TPIS ratio in Transmittal No. 8 is significantly higher than the ratio among LECs with a

^{13/} *Designation Order*, 13 FCC Rcd at 5145-48.

^{14/} *Id.* at 5145.

^{15/} *See id.* at 5145-48.

similar number of access lines.^{16/}

[2]...[S]tate whether its lease agreements for switching equipment are capital leases or some other type of lease agreement.^{17/}

[3]...[D]escribe each administrative proceeding and court action for which Beehive incurred legal costs for interstate access service. . . [and] explain how interstate access customers benefited from each of these court actions and administrative proceedings.^{18/}

[4]...[Provide] an explanation of the amount of corporate operations, plant specific, plant nonspecific, and customer operations expenses allocated between its regulated and nonregulated activities.^{19/}

[5]...[Provide] an explanation of each change made to the cost data filed for Transmittal No. 6 that is reflected in the cost information filed with Transmittal No. 8 and ... state the specific reason for each charge.^{20/}

Despite the enormous task, Beehive produced the records as required in the format specified. Additionally, as directed, Beehive provided a detailed explanation of its total operating expenses ("TOE") to TPIS ratio, see Direct Cases, CC Docket No. 97-249, at 6-13 (Apr. 1, 1998); stated that it had no capital leases; meticulously described each administrative proceeding and court action for which it incurred costs, see *id* at 17-31; explained its allocation of its nonregulated activities associated with customer premise wiring and internet service, see *id* at 32; and explained

^{16/} *Designation Order*, 13 FCC Rcd at 5145.

^{17/} *Id.* at 5146.

^{18/} *Id.* at 5147.

^{19/} *Id.*

^{20/} *Id.* at 5148.

the changes in the cost data filed in Transmittal No. 6 and Transmittal No. 8, see *id.* at 33-36. Accordingly, Beehive explained those items for which the Commission expressly required an explanation.

Beehive did not explain each entry contained in its cost data because it was not on notice that it should do so. Moreover, it knows of no rule or precedent that requires a carrier to explain each and every one of its costs. In any event, such a task would be nearly impossible in the amount of time Beehive was permitted to prepare its Direct Case. Beehive estimates that its cost data for years 1994, 1995 and 1996 included 45,000 separate entries.

Nonetheless, the Commission finds that "the cost data supporting its operating expenses show many inconsistent, questionable, and unexplained entries."^{21/} It supports this finding by referring to Account 6728, Other General and Administrative Expenses, and questioning "payments to dentists, florists, toy stores, the Immigration and Naturalization Service ("INS") and Internal Revenue Service."^{22/} The Commission does not explain why these entries do not fall within the category of

^{21/} Order at 10 (¶ 14).

^{22/} *Id.* The Commission quibbles that Beehive did not explain several ledger entries, including payments to the INS, Francis Garnes Brother and to health care providers. See Order 7-8 & n.46. Beehive was only required to produce its "unedited general ledgers". *Designation Order*, 13 FCC Rcd at 5146. It was not directed to explain its ledger entries. And it offered explanations as to those entries questioned by AT&T. See Rebuttals at 20-22. Beehive explained its payments to the INS and Mrs. Brothers, as well as its payment of medical expenses. See *id.* at 21-22.

"expenses incurred to perform general administrative activities not directly charged to the user and not provided for in other accounts."^{23/} Moreover, even if these, and other, entries have been designated to the incorrect account, it does not logically follow that Beehive's expenses should be disallowed; instead, the entries should be allocated to the proper account.

Additionally, Beehive did not explain its entries relating to its arrangement with JEI because it was not ordered to do so. In fact, the *Designation Order* makes no mention of JEI. Accordingly, Beehive was not on notice that its arrangement with JEI was at issue in this investigation, particularly since it is the subject of a formal complaint proceeding which is still ongoing. Nonetheless, the Commission bases its findings, in part, on the unexplained JEI-related entries. The Commission concludes, "Beehive has not provided any explanation for its relationship with JEI that would rebut concerns raised by its accounting treatment of JEI-related costs."^{24/}

The Commission further admonishes Beehive for "not adequately explain[ing] its net investment costs".^{25/} The Commission goes on to make the following findings:

[Beehive] has not explained why its net investment is approximately 55% higher than the net investment of companies with a comparable number of access lines as Beehive. Further, it has not sought to reconcile its net investment claimed in

^{23/} Order. at 10-11 (¶ 14).

^{24/} Id. at 9 (¶ 16).

^{25/} Id. at 10 (¶ 20).

this investigation with net investment claimed in previous proceedings, or explained why it has changed.^{26/}

Beehive was directed to explain its TOE to TPIS ratio, not its net investment costs. That is what it did. See Direct Case at 6-13. It was "unreasonable" for the Commission to fault Beehive for not responding to issues the Commission did not raise in the *Designation Order*. See *State of Wyoming*, 971 F.2d at 542. Beehive cannot be penalized for failing to do what it was not required to do.^{27/}

Despite following the Commission's instructions, the Commission determines that Beehive failed to meet its burden of proof because it failed to explain certain information. Beehive submits that the Commission's process was procedurally unfair because it altered in its *Order*, without notice, the issues set forth in the *Designation Order*.

B. The FCC Did Not Give Beehive the Opportunity to Address the New Issues.

Beehive was offered no opportunity to address the new issues by explaining those costs items which were of concern to the Commission. The denial exacerbated the procedural defect caused by the change in issues and was an obvious departure from the

^{26/} *Id.*

^{27/} Had the *Designation Order* contained this requirement, Beehive would not have been able to satisfy the Commission because Beehive does not know which companies the Commission considers as having "a comparable number of access lines to Beehive." Beehive can not be expected to make such a comparison when it has no way of knowing what it is comparing itself to.

Commission's own practice of eliciting additional information to resolve outstanding questions.

In "permit-but-disclose" tariff investigations the Commission has regularly "engaged in discussions for the purpose of obtaining information deemed essential to resolve expeditiously the issues raised in the investigation."^{28/} Yet, in this case, the Commission did not contact Beehive to request any additional information or explanations. By not engaging Beehive in such discussions, the Commission deprived Beehive of a fair opportunity to present its case regarding the issues that came to light in the Order.

The Commission permits *ex parte* discussions in tariff investigations in order to "facilitate a full exchange of information so that informed and reasoned agency decision making may result."^{29/} Here, the Commission made no effort to elicit additional information. Rather, the Commission chose to "disregard the cost and investment information Beehive ... filed in support of

^{28/} *Beehive Telephone, Inc. v. The Bell Operating Companies*, 12 FCC Rcd 17930, 17943 (1997) *petition for review filed*, *Beehive Telephone Co., Inc. v. FCC*, No. 97-1662 (D.C. Cir. Oct. 31, 1997). See also *Commission Applies "Permit But Disclose" Ex Parte Rules To Formal Complaint Filed by Beehive Telephone, Inc. Against the Bell Operating Companies*, 9 FCC Rcd 2751 (Com. Car. Bur. 1994) ("in conjunction with the investigation, and consistent with the Commission's *ex parte* rules providing for disclosure of permissible presentations, the staff has been engaged in discussions with certain parties for the purpose of obtaining information and exploring possible resolutions of the issues raised in the investigation.").

^{29/} *Amendment of Subpart H, Part 1 of the Commission's Rules and Regulation Concerning Ex Parte Communication and Presentation in Commission Proceedings*, 2 FCC Rcd 3011, 3012 (1987).

its 1998 access tariff filing and [to] base [its] prescription on costs of comparable companies"30/ That constituted uninformed and irrational decision-making.

Beehive properly relied on the *Designation Order* in completing its Direct Case. By changing the issues and then departing from its own practice of eliciting additional information, the Commission denied Beehive a fair hearing required by due process.

II. The Commission Went Beyond Its Jurisdiction
In Requiring Beehive to Justify Its Rates
Using Part 32

In the *Order*, the Commission states that "[u]nder section 201(a)(1), carriers bear the burden of demonstrating in a tariff investigation that the proposed rates are reasonable."^{31/} It then explains that "[a]s part of meeting this burden, carriers developing rates based on costs will ordinarily do so based on booked and accounts maintained in accordance with Part 32 of the Commission's rules."^{32/} Without justification, but apparently based on what other carriers "ordinarily do", the Commission finds that Beehive did not meet its burden of proof because it did not produce its records in conformity with Part 32. By its own

^{30/} *Order* at 11 (¶ 22).

^{31/} *Id.* at 10 (¶ 21).

^{32/} *Id.*

admission, however, Beehive was not obligated to comply with Part 32:

Beehive is not subject to our prescription of Part 32 pursuant to Section 219 and 220 of the Act that is applicable to fully subject carriers. 47 U.S.C. §§ 219, 220. We do not prescribe or require Beehive to comply with Part 32 as a general matter of company operations. We merely find that it has not met its burden to justify its proposed rates because it has not presented costs in accordance with Part 32, has not demonstrated that it records costs and revenues in a manner that allows compliance with Part 64, 36 and 69 of our rules, and has not otherwise adequately explained its accounting system.^{33/}

Since, as the Commission itself determined, Beehive was not required to comply with Part 32, the Commission went beyond its jurisdiction in its determination that Beehive did not meet its burden of proof to justify its proposed rates.^{34/}

III. The Commission's Did Not Engage In Reasoned Decision-Making

The Commission is charged with engaging in reasoned decision-making, i.e. it must consider the relevant facts and articulate a

^{33/} Order at 10 n.62.

^{34/} Moreover, it appears that the Commission evaluated Beehive on form over substance. In its Direct Case, as ordered, Beehive addressed the issue of why the cost data filed in Transmittal No. 8 differed from the cost data filed in Transmittal No. 6. In that discussion, Beehive disclosed the fact that it had discovered that its 1994-96 transactions had not been recorded in accordance with Part 32. Beehive then explained that it rebuilt "its records for years 1994, 1995, and a substantial part of 1996 in order to reflect the adjusted opening balances and to properly reflect [its] transactions in accordance with Part 32 accounts". Direct Case at 35. Accordingly, Beehive's accounting conform with general accepted accounting principals and are in accordance with Part 32. The Commission complains, however, that Beehive did not present its costs in accordance with Part 32. See Order at 6 (¶9).

rational connection between the facts found and the choice made. See *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Insurance Co.*, 463 U.S. 29, 43 (1983). See also *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850-53 (D.C. Cir. 1970). The *Order* contains instances where the Commission either misstates or ignores facts or considers facts in a light least favorable to Beehive. Moreover, the Commission applies no articulated standards to the facts. Its determinations are based on what amounts to nothing more than a "we-know-it-when-we-see-it" standard. *Northeast Cellular Telephone Co., L.P. v. FCC*, 897 F.2d 1164, 1167 (D.C. Cir. 1990). As a result, the *Order* consists of a collection of conclusory statements which hardly reflect reasoned decision-making. See *id.*

A. Factual Errors

Beehive provides the following list of factual inaccuracies contained in the *Order*:

1. In its description of the pleadings filed in the investigation, the Commission states, with regard to nonregulated activities, Beehive provided "no information regarding any provision of cable, cellular or other wireless service."^{35/} However, Beehive did explain that it "has no nonregulated activities associated with cable, cellular or other wireless service." Direct Case at 32.
2. In the same section describing the pleadings associated

^{35/} *Order* at 6 (¶ 10).

with the investigation, the Commission summarizes Beehives explanation of changes in its 1995-1996 data as containing only two reasons.^{36/} However, Beehive provided three. See Direct Case at 33-36.

3. The Commission states, "Beehives states that its accountant has not maintained its cost accounts and records in accordance with Part 32 of the Commission's rules."^{37/} That is untrue. Beehive stated that its prior accountants had failed to maintain its accounts in accordance with Part 32. See *id.* at 35. Its current accountant, however, corrected its records to conform with Part 32. See *supra* note 32.
4. The Commission finds that "a large portion of Beehive's legal expenses are classified as miscellaneous".^{38/} In fact, Beehive's miscellaneous legal expenses accounted for only 3.67% of its total legal costs in 1994; its miscellaneous expenses for 1995 accounted for only 5.73% of its total legal costs; and its miscellaneous expenses accounted for only 5.25% of its total legal costs in 1996.
5. In its review of Beehive's litigation expenses, the Commission states "Beehive seeks to recover \$562,946 in

^{36/} Order at 6 (¶ 10).

^{37/} *Id.* at 7 (¶ 13).

^{38/} *Id.* at 9 n.56.

legal expenses for 'shareholder' litigation that its description reveals primarily to be a defense to a property claim that arose from a divorce action filed against Beehive's President, Art Brothers, by Frances Gaines Brothers."^{39/} The Commission's factual finding is baseless. Setting aside the fact that Beehive's legal expenses in the shareholder litigation totalled \$554,536 (Beehive recovered \$8,410 in 1996 after it contested some of the legal fees) not \$562,946, see Direct Case at 28, that litigation simply cannot be characterized as arising from a "divorce action". The litigation centered on efforts to oust Mr. Brothers from control of Beehive. See Direct Case at 27-29; Rebuttals at 11-12. The Commission made no effort to address the case law cited by Beehive that makes the expenses of such shareholder litigation recoverable from ratepayers. See Direct Case at 29.

B. Legal Errors

In addition to factual errors, the *Order* contains errors of law. The most blatant error is the Commission's misinterpretation and use of the rebuttable presumption afforded Beehive's legal expenses. At paragraph 18 of the *Order*, the Commission correctly states that the rebuttable presumption which Beehive is entitled to is that "all litigation costs 'arise out of events occurring in the

^{39/} Order at 9-10 (¶ 19).

normal course of providing service to ratepayers and that ratepayers benefit from provision of service'".^{40/} The Commission further notes that "the presumption may be overcome by evidence that the proceeding was illegal, duplicative or unnecessary."^{41/} However, instead of providing Beehive the benefit of the presumption, the Commission evaluates Beehive's legal expenses by imposing a burden on Beehive to show that the litigation was related to, or necessary for, the provision of service, and that the expenses benefitted ratepayers.^{42/}

For example, the Commission determined that the legal expenses for the "shareholder" litigation and the contract case brought against James Ball "does not show any relationship to Beehive's provision of interstate access service to its ratepayers and, thus, the associated legal expenses should not be recovered in Beehive's rates."^{43/} With respect to Beehive's lawsuit concerning the Hanksville exchange, the Commission concludes that it "[did] not believe that this litigation was necessary to Beehive's provision

^{40/} Order at 9 (¶ 18) (quoting *Accounting for Judgement and Other cost Associated with Litigation*, 12 FCC Rcd 5112, 5114 (1997) ("*Litigation Costs*")).

^{41/} *Id.*

^{42/} *Id.* Although Beehive explained in its Direct Case that it should not be required to explain how interstate access customers benefitted from the court actions or administrative proceedings, see Direct Case at 14, it nonetheless provided such an analysis.

^{43/} *Id.* at 9-10 (¶ 19).

of service to its existing ratepayers."^{44/}

The test is not whether the litigation relates to the provision of service; the presumption is that all litigation costs arise out of events occurring in the normal course of providing service to ratepayers. Put another way, the analysis does not turn on whether the specific litigation was necessary to provide service, but, rather, whether the litigation arose in the ordinary course of business. As explained in Beehive's Rebuttals, which the Commission does not address in its *Order*, under federal law, "a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof . . . which remains throughout . . . upon the party on whom it was originally cast."^{45/}

Thus, once Beehive established the basic facts giving rise to the presumption (that its litigation costs arose in the normal course of its business providing service to ratepayers), the effect of the presumption was to place the burden upon AT&T of establishing the nonexistence of the presumed fact (that the litigation costs benefitted ratepayers).^{46/} While the burden of persuasion remains with it, Beehive may prevail on the strength of

^{44/} *Order* at 9 (¶18).

^{45/} Fed. R. Evid. 301. See *Panduit Corp. v. All States Plastic Manufacturing Co., Inc.*, 744 F.2d 1564, 1579 (Fed. Cir. 1984).

^{46/} See Fed. R. Evid. 201 (advisory committee notes); *Panduit*, 744 F.2d at 1579.

the presumption if AT&T failed to rebut it.^{47/}

With respect to each piece of litigation, Beehive established the fact that the litigation arose from conduct undertaken by it in the normal course of business.^{48/} Thus, Beehive established the "base" fact that gives rise to the presumption that the expense of the litigation benefitted its ratepayers.^{49/} That placed on AT&T the burden of making the factual showing that Beehive's expenses were incurred as a result of carrier conduct that could not "reasonably be expected to benefit ratepayers."^{50/} AT&T never carried that burden. As a result, the presumption of ratepayer benefit "retains its viability"^{51/}, and Beehive may prevail on its strength.^{52/}

Moreover, in only one instance - involving the Federal Aviation Administration and the City of Wendover for airport access - does the Commission find that Beehive's litigation expenses did not arise in the ordinary course of Beehive's business and even

^{47/} See *Keeler Brass Co. v. Continental Brass Co.*, 862 F.2d 1063, 1066 (4th Cir. 1988).

^{48/} See Direct Case at 17-31.

^{49/} See *Panduit*, 744 F.2d at 1577.

^{50/} *Mountain States Telephone and Telegraph Co. v. FCC*, 939 F.2d 1035, 1043 (D.C. Cir. 1991); *Litigation Costs*, 12 FCC Rcd at 1524 n.62.

^{51/} *Panduit*, 764 F.2d at 1577.

^{52/} See *Keeler Brass*, 862 F.2d at 1066.

then, its finding is not supported by the facts.^{53/} The Order does not point to any "evidence that the proceeding[s] were illegal, duplicative or unnecessary"^{54/}, and, therefore, the presumption afforded Beehive was not overcome. The Commission's incorrect application of the rebuttable presumption is reversible error.

Beehive went to great lengths (and incurred substantial legal fees in the process) to describe each administrative proceeding and court action in which it was a party, and to show that the costs it incurred in such litigation were recoverable.^{55/} The Commission disallowed \$1.31 million in legal expenses on the basis of three conclusory statements in one paragraph.^{56/} The Commission did not

^{53/} Although the Commission acknowledges that in its provision of telecommunications service "Beehive may require aircraft to respond to service outages and customer complaints" it finds that "the construction of a heated hanger does not necessarily arise in the ordinary course of providing telecommunications service." Order at 10 (¶ 19). Although it may be true that for most carriers the provision of telecommunication service does not dictate the construction of a heated hanger, the provision of service to the area that Beehive operates in - Wendover, Utah, where the temperatures are harsh, both in summer and winter - requires that Beehive keep its planes in a hanger. The Commission cites no facts to contradict Beehive's uncontested assertion that a heated hanger was necessary considering the conditions under which Beehive must operate, the construction of a hanger arose in the ordinary course of Beehive's business.

^{54/} Order at 9 (¶ 18). The Commission does state, with regard to the "Hansville" litigation, "we do not believe this litigation was necessary . . .", but it does not articulate a factual basis for that conclusion.

^{55/} See Direct Case at 17-31; Rebuttals at 11-20.

^{56/} See Order at 9-10 (¶19).

"articulate with reasonable clarity its reasons for [its conclusions], and identify the significance of the crucial facts". *Great Boston*, 444 F.2d at 851. Nor did it provide a legal or factual basis on which it could disallow all of Beehive's litigation costs by claiming that four out of eleven pieces of litigation were not "related" or "necessary" to its interstate access service.^{57/}

For example, the Commission disallowed \$51,601 in litigation costs because it formed that the contract suit brought by James E. Ball had no "relationship" to Beehive's access service to ratepayers.^{58/} The Commission disregarded Beehive's showing that its defense of the Ball suite (which seeks an award of \$120,000) could result in "net benefit" to ratepayers.^{59/} More importantly, the Commission made no attempt to explain its departure from its historic view that "contract disputes" arose out of the ordinary course of a carrier's business. *Litigation Costs* 12 FCC Rcd at 5118.

Moreover, as explained in its Direct case, when the Commission considers Beehive's legal expenses, it must consider the constitutional implications of its actions. Beehive's First Amendment right to petition the government for redress of grievances ensures meaningful access to administrative agencies and

^{57/} See *id.*

^{58/} See *id.*

^{59/} See Rebuttals at 17.

the courts.^{60/} Beehive's right of access to the Commission and the courts "encompasses all the means a . . . petitioner might require to get a fair hearing".^{61/} One such means that is necessarily involved in the right of access is the opportunity to seek and receive the assistance of an attorney.^{62/} A Commission ruling disallowing legal expenses actually incurred by Beehive in the exercise of its First Amendment right to petition would infringe on that constitutional right.

It should also be remembered that Beehive and the Commission are currently adversaries in a proceeding pending at the District of Columbia Circuit involving Beehive's complaint alleging that access to the SMS/800 is not subject to tariff regulations under Title II of the Act. To disallow its legal expenses smacks of impropriety and unfair dealings.

Conclusion

The Commission cannot use the burden of proof under section 204(a)(1) of the Act as "a magic wand that frees [it] from the responsibility of reasoned decision-making." *Southwestern Bell Telephone Co. v. FCC*, 28 F.3d 165, 172 (D.C. Cir. 1994) (quoting *Kansas Gas & Electric Co. v. FERC*, 758 F.2d 713, 721 (D.C. Cir. 1985)). The Commission did worse than that here. It not only

^{60/} See *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972).

^{61/} *Gilmore v. Lynch*, 319 F.Supp. 105, 110 (N.D. Cal. 1970), *aff'd sub nom.*, *Younger v. Gilmore*, 404 U.S. 15, 92 (1971).

^{62/} *Procunier v. Martinez*, 416 U.S. 396, 419 (1974).